ABSTRACTS

Injunction against Noise from Air Force Base and the amended Administrative Litigation Act

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Though many cases, in which plaintiffs asked for injunction against the noise from air force bases, have been brought to courts, the Supreme Court would not answer the question, what kind of remedy is suitable for those litigations, until today (see Sup. Ct. Feb. 25, 1993, *Minshu* vol. 47, No. 2, p.643). There seem some historical reasons for this irrational stance of the Supreme Court. Firstly, construction of administrative litigation system in Meiji era was quite inadequate for the remedy for protection of rights against administrative activities. Secondly, the judicial reform after World War II had failed the transformation of administrative court system, which had played a part as a remedial system to some extent. And thirdly, courts have hesitated about control over the administrative power in relation to interpretation of Administrative Litigation Act 1962.

Since the beginning of this century, circumstances showed some signs of change : as a part of the reformation of judicial system, Administrative Litigation Act was amended in 2004. In this amendment, a kind of injunction against administrative action (section 7 of article 3) and declaratory judgment in a civil-party-litigation (article 4 : a form of civil procedure in public law) were provided. According to those new provisions, courts should decide the way of remedy in those cases.

In this article, I insist that courts could decide injunction to stop the noise from air bases under this amended Administrative Litigation Act, whether taking off and landing of fighter planes are "exercise of public

power" to neighbors of bases or not, and that courts could also decide injunction in relation to U. S. fighter planes, because Japanese government could exercise its rights to control Japanese bases in accordance with section 4. (b) of article 2 U. S. -Japan Status of Forces Agreement (Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan).

Constitutional Theories and Practices

Takashi KANAZAWA

The American constitutional theories have long centered on the judicial practices of the Supreme Court. Since the power of the judicial review was not granted by the Constitution, its justification has been their primary mission. Accordingly constitutional theorists have been influenced by and reflected the trend of the Court ; the Court itself has been changing. That is why constitutional theories would inevitably interrelate with judicial practices as opposed to those of Japan.

This article aims to introduce two of the most recent theories and analyze them briefly. One is Prof. Pamela S. Karlan's theory. She argues in her 2011 Foreword to the Harvard Law Review, after seven Terms, the Roberts Court appears to combine a very robust view of its interpretive supremacy with a strikingly restrictive view of Congress's enumerative powers. In short, the current Court with a disdain for democracy wants to reverse or limit much of the Warren Court legacy. But her theory might be distorted by her disdain for the conservative majority of the Court. The other is Prof. Dan M. Kahan's one. He

addresses the neutrality of Supreme Court decisionmaking in his 2010 Foreword and argues that the current Court's neutrality crisis will be attributed to the motivated reasoning not on Justices but on citizen's assessment of their decisions. Therefore public confidence in the Supreme Court's neutrality can be restored by the Court's communication through idioms and gestures that avoid the motivated reasoning not through the theoretical abstractions. Truly his socio-psychological analysis is sophisticated but it is doubtful whether the Justices can be persuaded by his argument.

Contribution à l'étude de la date de naissance des créances

Dai SHIRAISHI

À quel moment une créance contractuelle naît-elle? À première vue, cette question paraît trop simple : il semble que la date de sa naissance n'est que celle de la formation du contrat. Cependant, cette apparence est trompeuse : d'après la jurisprudence japonaise, le loyer ou le salaire naissent, en contraste avec le prix de vente ou d'entreprise, au fur et à mesure de la jouissance du local (loyer) ou de la prestation du travail (salaire), sans que les arguments convaincants à l'appui de cette distinction soient apportés. En outre, la cour suprême japonaise a jugé que le loyer se compose d'une créance-racine et de créances-branches, mais il n'est pas clair pourquoi celui-ci est considéré comme ayant la structure dualiste, ni quelle est la substance de chacun de ces composants. Par ailleurs, sur le plan pratique, on voit mal comment limiter les effets de la cession ou la compensation globales qui ont pour objet les loyers « futurs », « à naître ».

Or, en droit civil français, depuis les années 1980, on discute vivement sur la date de naissance des créances issues d'un contrat à exécution successive (bail, contrat de travail). Trois thèses y sont avancées : la thèse « matérialiste » prétend que ces créances naissent graduellement en proportion de la contre-prestation effectuée ; la thèse « volontariste » affirme que celles-ci sont produites, en entier, aussitôt le contrat formé ; la thèse « normativiste » soutient qu'elles apparaissent progressivement à chaque terme fixé par les contractants. Ce débat est associé au problème pratique : si le bailleur d'une maison subit une procédure collective après avoir cédé les loyers, à qui appartiendront-ils? La Cour de cassation a tranché cette question au bénéfice du cessionnaire, et c'est sur la thèse « volontariste » qu'elle a basé son jugement.

Dans cette étude du droit comparé franco-japonais, nous essaierons de présenter une nouvelle thèse de la date de naissance des créances contractuelles et de limiter par là les effets de la disposition globale des loyers « futurs ».